No. 84-50

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") submit this reply brief in support of their Petition For Certiorari herein.

I. RETROACTIVE RELIEF WOULD VIOLATE THE CONTRACT RIGHTS OF MEN

The briefs filed in opposition to the Petition herein studiously avoid any serious discussion of the injury to

hundreds of thousands of men in the TIAA-CREF system who would be expected to select a single life option at retirement and thus bear the financial burden of the retroactive equalization of benefits ordered by the court below. While apparently conceding that these men will thus suffer an inequity through implementation of the lower court's decision, the EEOC would quibble over its severity. *See* EEOC br. 14n.6. Petitioners submit that the loss to a pensioner of up to 8% of his retirement benefits manifestly is severe to him.[1]

Respondents choose to address the financial impact on TIAA-CREF of the retroactive relief granted below, which has never been an issue in this case. Alternatively it is claimed (*see* EEOC br. 4-7) that TIAA and CREF always have been contractually free to disregard sex in paying annuity benefits. No such finding has been made by the Court of Appeals[2] and the EEOC brief (p.14) to the contrary is wrong. Nor could such a finding be properly made in light of the indisputable factual record. The CREF contracts given to annuitants prior to retirement provide, in pertinent part (JA505[3]):

> The number of Annuity Units on the Annuity Starting Date will depend on the number of Accumu-

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1 The AAUP, whose interest in raising women's benefits at the expense of the men has been consistent, makes the curious suggestion (br. 5-6) that its participation has provided representation of the male annuitants in this proceeding.

2 The District Court's seemingly contrary position as to CREF (*see* 89a-90a of the Appendix to the Petition) was based upon the erroneous view that an award affecting the value of contributions made in the past was not retroactive. Such an award is "fundamentally retroactive." *Arizona Governing Committee* v. *Norris*, 103 S. Ct. 3492, 3503 [Marshall, J.].

3 Citations to "JA____" refer to pages in the Joint Appendix filed in the Court of Appeals.

> lation Units, the values of Accumulation and Annuity Units, the Optional Type of Annuity Income elected, *the age and sex of the Participant* and in the case of a Survivor Unit-annuity, the age and sex of the Participant's spouse.

(Emphasis added.) The CREF Rules of the Fund which also govern the payment of CREF retirement benefits likewise provide for the payment of sex-distinct benefits. JA513. Similarly, the TIAA contracts state (JA497) as to the guaranteed portion of the benefits that:

> The amount of the initial monthly annuity payment will be determined by the amount of the Accumulation and the applicable Rate Schedule or Schedules; and will depend on the Optional Type of Annuity Income elected, the *age and sex of the Annuitant*, and in the case of a Survivor Annuity, the age and sex of the Annuitant's spouse. (Emphasis added.)

Finally, as to the distribution of TIAA earnings, it would vitiate the foregoing contractual provision if the earnings on the amount guaranteed could be computed on a sex-neutral basis. It beggars common sense to suggest that the total benefit could be determined by two contradictory formulas. Moreover, TIAA has annually committed to its annuitants, in the Report of Annuity Premiums and Benefits sent to each of them, that earnings on pre-August 1, 1983 contributions would be distributed on a sex-distinct basis. JA542-45. In short, a clear contractual obligation exists requiring that *all* bene-

fits, both the guaranteed and dividend portions thereof, be so distributed.[4]

In light of the evident equities created by TIAA-CREF's conduct, its written representations and contracts, it is important to note that the issue of awarding relief against insurance companies in this context has never been reviewed by this Court. Indeed, in commenting on the same form of relief in his brief in response to the pre-*Norris* Petition of TIAA-CREF (br. of January 1983 at 20-21), the Solicitor General admitted that:

> If this Court concludes that it was also proper to award relief against TIAA or CREF . . . it will be necessary as well to consider the propriety of the relief ordered against them. . . .

The earlier conclusion of the Solicitor General, now inexplicably changed, is correct and the lower court's award of relief against TIAA-CREF should be reviewed.

Respondent's "rationale" for retroactively reducing men's benefits is that because they do not know precisely how much they will be receiving during their future retirement anyway, they will never miss it. *See* AAUP br. 4-5; EEOC br. 14-15n.6. This argument has no place in any rational legal system. Furthermore, lack of precise certainty in the amount of future retirement benefits is true of *all* annuities in which, as here, the size of contributions, rate of earnings on amounts contributed, and date of retirement, are flexible. *See* Petition 15. Petitioners submit that this Court in *Norris* meant to cut across individual differences in the multitude of various

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4 Copies of the TIAA and CREF contracts and the Report of Annuity Premiums and Benefits form have been lodged with the Clerk of the Court and supplied to counsel for the parties.

employer-operated annuity and retirement plans in existence in this country and establish one date—August 1, 1983—for compliance with the prospective relief granted therein. The schools in the TIAA-CREF system have so complied and the men in the TIAA-CREF system should, therefore, be free of any further claims for relief.

II. SPIRT AND PETERS ARE IN CONFLICT

Respondents (EEOC br. 16; AAUP br. 18) seek to dilute the conflict between *Spirt* and the Sixth Circuit's holding in *Peters* v. *Wayne State University*, 691 F.2d 235 (1982), that TIAA and CREF are not employers of their annuitants by stating the obvious—that this Court vacated and remanded *Peters* in light of *Norris*. 103 S. Ct. 3566. Nothing in *Norris* even remotely addressed the application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. (1982), to employers and their agents, and the definition of those terms. The only other authority contrary to *Peters* on the question was the lower court's decision in *Spirt*, which was cited but obviously not followed by the Sixth Circuit in *Peters*. There is no reason to believe that the Sixth Circuit's holding on this issue would not be reaffirmed and a conflict therefore does exist.[5]

III. DENIAL OF CERTIORARI WILL NOT RESOLVE OTHER CASES PENDING BELOW

The EEOC (br. 15n.7) and the AAUP (br. 16) both suggest that the other eight cases pending against TIAA-

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5 As in the case of the propriety of the retroactive relief granted herein, the Solicitor General also formerly found the question whether TIAA-CREF were employers within the meaning of Title VII to be "worthy of review by this Court." Br. of January 1983 at 21. Again, we believe his earlier conclusion to be correct and the circumstances underlying it unchanged since it was first expressed.

CREF in the lower federal courts (*see* Petition 12n.4) will be "immediately" resolved should certiorari be denied. Such an eventuality is, in fact, most unlikely. Rather, it can be anticipated that plaintiffs in the other actions would in that circumstance seek to make the relief granted in *Spirt* merely the floor upon which claims for more retroactive relief will be piled. The ACLU representing plaintiffs in *Peters* have indicated that this is precisely how they intend to proceed in the Sixth Circuit.[6] The Second Circuit's decision has obscured the clarity of the August 1, 1983 compliance date established in *Norris* and it should be reviewed and reversed.

IV. THE McCARRAN-FERGUSON ACT BARS THE ENTRY OF RETROACTIVE RELIEF

Contrary to the AAUP's suggestion (br. 9n.22, selectively quoting Justice Marshall's opinion (103 S. Ct. at 3500n.17)), *Norris* did not "lay the [McCarran-Ferguson issue] to rest." As is obvious from reading the entirety of Justice Marshall's footnote, he was not there suggesting that the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* (1982), was incapable of shielding insurers from Title VII, but only that in the absence of any insurers as parties in *Norris* the Act was there inapplicable. Indeed, Justice Marshall later commented that "our judgment will in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated actuarial tables." *Id.*

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6 In its letter to the District Court of May 23, 1984 (fn. p. 2), the ACLU stated: "The *Spirt* case involved only deferred annuitants. . . . For those issues remaining for the portion of the class [in *Peters*] who retired prior to May 1980, plaintiffs would seek to proceed, upon compliance by TIAA-CREF with the judgment in *Spirt*, with resolution of related factual and legal issues regarding the relief due such retirees." A copy of the ACLU's letter has been lodged with the Clerk of the Court and copies supplied to all counsel.

The central McCarran-Ferguson issue herein—the judicial alteration of the statutes' scope—has not been addressed by Respondents. This issue does not call into question Congressional intent, as suggested by the court below (28a) and respondent Spirt (br. 16), because the intent of Congress in its use of the words "No Act of Congress" in the statute does not admit of any ambiguity. The Second Circuit has reworded the Act contrary to its meaning and brought uncertainty to the scope of the Act's protection. *See* Petition 18-21. This Court should grant certiorari and reverse this destructive interpretation of an important federal statute.

CONCLUSION

For all the foregoing reasons and those expressed in their Petition herein, we urge that a writ of certiorari issue to review the May 21, 1984 and September 29, 1982 decisions of the Second Circuit.

Respectfully submitted,

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